U.S. Department of Labor

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Issue Date: 17 December 2002

CASE NO. 2002-LHC-262

OWCP NO. 03-23647

In the Matter of:

GEORGE T. NEWMAN
Claimant

v.

CONSOLIDATION COAL COMPANY
Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party in Interest

DECISION AND ORDER - GRANTING EMPLOYER'S MOTION FOR SUMMARY JUDGMENT AND DENYING CLAIMANT'S CROSS MOTION FOR SUMMARY JUDGMENT

This proceeding arises from a claim for compensation under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 *et seq* and the implementing regulations at 20 CFR Parts 701 and 702. After a conference between the undersigned and the parties' counsel on June 10, 2002, employer (Consol) filed Motion for Summary Judgment on August 5, 2002. Claimant filed a response and a Cross Motion for Summary Judgment on November 4, 2002. Employer requested and was permitted to file a reply brief which was received on December 3, 2002.

Factual Summary

Claimant was employed by Consol on board a towboat on the Monongahela River on April 27,1989 when he was severely injured attempting to secure an empty barge to another barge. (EX O)[1] On May 23, 1989, Consol began voluntarily paying claimant benefits under the LHWCA. (R-1) In January1990, claimant filed suit against Consol in state court under the Jones Act, 46 U.S.C. § 4688, for negligence and unseaworthiness, and alleging that he was a member of a crew. (EX A)[2] Although initially contesting claimant's status as a seaman under the Jones Act, Consol ultimately conceded that claimant was a seaman. (EX B, C) Consol then filed a Complaint for Exoneration From or Limitation of Liability pursuant to the Limitation of Vessel Owner's Liability Act, 46 U.S.C. App. § 183, which potentially limits the liability of a vessel owner to the owners' interest in the vessel and the value of its freight, in the United States District Court for the Western District of Pennsylvania. (EX D) Claimant then filed suit in the same forum under the Jones Act again alleging claimant's seaman status. (EX E) As in the state proceeding, Consol eventually stipulated that claimant was a seaman under the Jones Act. (EX F, R 48) After initially enjoining all other proceedings arising out of claimant's injury, the federal judge modified the injunction to allow the proceeding in state court to continue provided that claimant waived any *res judicata* effect of the state court proceeding. (EX G, H)

In both the state and federal court proceedings, claimant offered testimony that he was a deckhand aboard employer's vessel. See EX I, L, M, N, R 56. The jury returned a verdict for claimant in the amount of $1,327,000 in the state case, but in a decision issued on July 17, 1996, the federal judge found no liability on the part of Consol and dismissed the case, effectively nullifying the jury verdict. (EX O) The decision of the federal judge was affirmed by the Third Circuit, *In re Consolidation Coal Co.*, 123 F. 2d 126 (3d Cir. 1997). After making voluntary payments to claimant under the LHWCA since 1989, Consol terminated benefits as of October 31, 2000. (EX P) Claimant then filed a claim for benefits under the LHWCA. (EX Q)

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[1]The following abbreviations have been used: EX =exhibits appended to the employer's brief, R= portions of the reproduced record submitted by claimant.

[2]The Jones Act allows a member of a crew of a vessel injured during the course of employment to bring suit against his employer for negligence or the unseaworthiness of the vessel.

Conclusions of Law

The employer argues that judgment of the federal court is collateral estoppel as to whether claimant is a seaman under the Jones Act. See Employer's brief at p. 11.[3] [As the LHWCA excludes from its coverage a "master or member of a crew" of any vessel, and a "seaman" under the Jones Act is the same as a "master or member of a crew" of a vessel, the two Acts are considered to be mutually exclusive. See 33 U.S.C. § 902(3), *McDermott Int'l v. Wilander*, 498 U.S. 337, 26 BRBS 75 (CRT)(1991)]. Claimant responds that claimant's status under the Jones Act was stipulated to by the parties and therefore can not be the subject of collateral estoppel. See Claimant's brief at pp 12-13. Although Consol concedes that ordinarily collateral estoppel does not apply to stipulations made in a prior proceeding, it maintains that in the prior proceeding in federal court, claimant did not merely concede his seaman status but affirmatively asserted and proved it, and that his status as a seaman was a prerequisite to federal court jurisdiction. Emp. Brief at p. 12. It is unnecessary, however, to determine whether the parties' stipulation in the prior litigation invokes the doctrine of collateral estoppel as claimant's claim under the LHWCA is precluded by the doctrine of judicial estoppel.

Judicial estoppel, sometimes called the doctrine of preclusion of inconsistent positions, precludes a party from gaining an advantage by taking one position, and seeking a second advantage by taking an incompatible position. *Rissotto v. Plumbers and Steamfitters Local 343*, 94 F. 3d 597 (9th Cir. 1996). In *Russell v. Rolfs*, 893 F. 2d 1033, (9th Cir. 1990), the court stated that:

> The policies underlying preclusion of inconsistent positions are general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings... Judicial estoppel is intended to protect against a litigant playing fast and loose with the courts... Because it is intended to protect the dignity of the judicial process, it is an equitable doctrine invoked by a court at its discretion.

893 F. 2d at 1037

In the instant proceeding, claimant filed suit under the Jones Act in both state and federal court and presented testimony that he was a member of the crew of the vessel on which he was injured. He would not have been able to recover damages under the Jones Act unless he had been able to prove his status as a "seaman". Although claimant's suit in federal court was dismissed because he could not prove that Consol was negligent, he nevertheless was able to invoke its jurisdiction and the jurisdiction of the state court under the Jones Act by representing himself as a "seaman"and presenting evidence that he was covered by that statute. Having benefitted by

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[3]Collateral estoppel bars a party from relitigating an issue if (1) the issue at stake is identical to the one in the prior litigation; (2) the issue was actually litigated in the prior litigation; and (3) the determination of the issue in the prior litigation was a critical and necessary part of the judgment in the earlier action. *Clark v. Bear Stearns & Co.*, 966 F. 2d 1318, 1320 (9th Cir. 1992).

taking that position in state and federal court, claimant is precluded by the doctrine of judicial estoppel from now asserting that he is not a "seaman" Act and that he is instead covered by the LHWCA. Claimant is not permitted to take one position in a prior proceeding and to take an inconsistent position in a second proceeding.

Dismissal of this claim is also supported by the decision in *Sharp v. Johnson Bros. Corp.*, 973 F. 2d 423 (5th Cir. 1992). In *Sharp*, the plaintiff had filed a claim under the LHWCA and reached a settlement with the defendant and it insurer. An administrative law judge entered an order approving the settlement. Plaintiff also filed suit under the Jones Act. The district court granted summary judgment against Sharp in the Jones Act suit ruling that the settlement approved by the ALJ precluded a suit under the Jones Act. The Court of Appeals affirmed, distinguishing the case from the holding of the Supreme Court in *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991) in which a plaintiff who received voluntary payments under the LHWCA was allowed to file a subsequent suit under the Jones Act. The court in *Sharp* stated that: "It is beyond cavil that merely accepting voluntary payments under the LHWCA without a formal award does not bar a worker from filing a Jones Act suit." The court stated, however, that a settlement agreement is treated like a formal award. 973 F. 2d at p. 426.

The court went on to hold that the plaintiff could not reargue the issue of coverage.

> It is true that LHWCA coverage was never litigated in an adversarial proceeding. But Sharp availed himself of the statutory machinery to bargain for an award, and he had the full opportunity to argue for (or against) coverage. He filed a claim for LHWCA benefits, invoking the jurisdiction of the DOL. Pursuant to 33 U.S.C. § 908 (i)(1), the ALJ considered Sharp's testimony, as well as the parties' stipulations and their settlement, before issuing its (sic) findings of fact and order extinguishing Johnson Brother's and Wausau's liability for LHWCA benefits.
>
> Having obtained the order of the ALJ and the aegis of the DOL to ratify and enforce its settlement, Sharp ensured that his rights were more secure under the agreement than they would have been if the settlement were considered merely a contract between the parties (footnote omitted). It follows that where an ALJ issues a compensation order ratifying a settlement agreement, a "formal award" should be deemed to have been made under *Gizoni*, and the injured party no longer may bring a Jones Act suit for the same injuries.

Id.

Although the situation in *Sharp* is the reverse of the present case, where the Jones Act case was litigated before the LHWCA claim, the same result is warranted. Claimant represented that he was a "seaman" covered by the Jones Act in the prior federal proceeding, and although that issue was not litigated, because he filed suit under the Jones Act and presented testimony that he was a member of a crew, claimant is now precluded from arguing in this case that he was not a

member of a crew and asserting coverage under the LHWCA. The employer's Motion for Summary Judgment will be granted.

As the employer's Motion for Summary Judgement is granted for the reasons stated, its other arguments will not be addressed.

For good cause shown:

IT IS ORDERED THAT the Motion for Summary Judgment filed by Consolidation Coal Company is GRANTED.

IT IS FURTHER ORDERED THAT the Cross Motion for Summary Judgment filed by claimant is DENIED.

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DANIEL L. LELAND
Administrative Law Judge

DLL/kmj